United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2048

to be argued by RICHARD R. ROMERO

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICHARD A. MARI,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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I N D E X

C I T A T I O N S

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No. 75-2048

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BRIEF FOR APPELLEE

ISSUE PRESENTED

Whether defense counsel's joint representation of appellant and his co-defendant rendered appellant's guilty plea involuntary.

STATEMENT

A seven count indictment filed on May 31, 1973, in the United States District Court for the Eastern District of New York charged appellant with an extortionate extension of credit to Joseph Freno, Jr., in violation of 18 U.S.C. 891(6) and 892 (Count II), and charged appellant and William James

MacQueen, in four joint counts (Counts I, III, V, VI) and two separate counts (Mari--Count IV; Macqueen--Count VII) with conspiracy to use extortionate means to collect this extension of credit and various substantive offenses of extortion, in violation of 18 U.S.C. 892, 894 and 2. In January 1974, appellant pleaded guilty to Count II of the indictment and was sentenced in April 1974 to four months' imprisonment to be followed by thirty-six months' probation.[1/] In November 1974, after completion of his term of imprisonment, appellant moved to vacate his conviction, pursuant to 28 U.S.C. 2255,[2/] on grounds of the involuntariness of his guilty plea due to an alleged conflict of interest in defense counsel's joint representation of appellant and co-defendant MacQueen (App. A-2). On November 22, 1974, Judge Bartels, following a hearing, denied appellant's §2255 motion.

1/ Co-defendant MacQueen waived indictment, pleaded guilty to a two-count superseding information, and was sentenced to eighteen months' probation.

2/ Appellant's motion to vacate was also filed "pursuant to Rule 35, Federal Rules of Criminal Procedure" (App. A-2). The motion, however, was untimely under Rule 35, since it was filed more than 120 days after imposition of sentence. Rule 35, F.R.Crim.P.

1. The Rule 11 Hearings.

On January 18, 1974, appellant and MacQueen, both of whom retained Kenneth Saloway as counsel, appeared before Judge Bartels to request withdrawal of their prior not guilty pleas and entry of guilty pleas. When the court learned of Saloway's joint representation of appellant and MacQueen, the court asked Saloway if he had considered a possible conflict of interest. Saloway responded that he did not believe that such a conflict existed. The court then asked appellant and MacQueen if they understood that they were represented by the same counsel (Tr. Jan. 18, 1974, at 3-4). After appellant and MacQueen indicated that they understood, the court gave the following warning:

> THE COURT: I don't know anything about the case, but when one lawyer represents more than one defendant, there's always a question as to whether both defendants are in identically the same position. If they are not, there might be a conflict of interest which would make it impossible for the same attorney to represent adequately the two defendants.
>
> You understand that? You know that? I don't know whether it is a conflict of interest, but I've got to point out to you that you must consider that before I will take a plea of guilty from both of you represented by the same man [Tr. Jan. 18, 1974, at 4].

The court then asked appellant, MacQueen, and Saloway if they had considered the dangers of a possible conflict of interest. All three responded affirmatively (Id.). Thereupon, Saloway, after stating that appellant and MacQueen had told him all the facts of the case, assured the court that his clients were in a similar position, that there was no conflict of "rights" or "liabilities," that if the case were to go to trial, Saloway would take the same position for both clients; and that both clients told him that they were guilty of the charges. Saloway added, however, that if there were a trial, he could not say that "MacQueen would take the same exact position as he's taking before the Court today. There could be a difference if there was a trial" (Tr. Jan. 18, 1974, at 5).

The court asked appellant and MacQueen if they each understood the position of the other in the case. Both responded affirmatively and indicated that they wished to plead guilty (Tr. Jan. 18, 1974, at 16). However, neither appellant nor MacQueen pleaded guilty at that time because of a possible technical defect in the conspiracy count to which MacQueen was to plead guilty and because defense counsel wished both pleas to be made at the same time (Tr. Jan. 18, 1974, at 6-11).

Subsequently, a superseding two count information was filed charging MacQueen and appellant (named as a co-conspirator but not a defendant) with conspiracy to collect and attempt to

collect by extortionate means from Freno, Jr. an extension of credit, in violation of 18 U.S.C. 894. MacQueen was also charged with using extortionate means to collect or attempt to collect an extension of credit from Freno, Jr., in violation of 18 U.S.C. 371, 891(7), and 894.

On January 25, 1974, appellant and MacQueen, jointly represented by Saloway, again appeared before Judge Bartels. Upon hearing that appellant intended to plead guilty to Count II of the May 31 indictment (extortionate extension of credit), the court personally addressed appellant and advised him that he was charged with renewing a loan to Joseph Freno, Jr. in the amount of $1,050. The court further explained that, according to the charge, it was understood that Freno would repay the loan at the rate of $40 per week for an indefinite period and that delay in making repayments and failure to make repayment could result in the use of violence and other criminal means to cause harm to Freno's person, reputation, or property (Tr. Jan. 25, 1974, at 3-4). After appellant's counsel informed the court that he had explained the charge to appellant, appellant personally advised the court that he understood the nature of the charge (Tr. Jan. 25, 1974, at 4-5).

The court then advised appellant that a guilty plea would constitute a waiver of his rights to trial by jury,[3/] confrontation of witnesses, and compulsory process of witnesses to appear on his own behalf. The court further advised appellant that if he proceeded to trial he would have the right to remain silent and the right to counsel. Appellant indicated to the court that he understood that he would be waiving these rights (Tr. Jan. 25, 1974, at 5-6).

Finally, the court advised appellant that a guilty plea would subject him to a possible sentence of 20 years' imprisonment and a $10,000 fine. After appellant indicated that he understood the possible maximum sentence, he entered his plea of guilty (Tr. Jan. 25, 1974, at 6). Thereupon, as a factual basis for his plea, appellant stated that he had loaned $500 to Freno, Jr. to bail Freno, Jr. and his brother out of jail. Appellant also loaned an additional sum to Freno, Jr. to pay for an attorney, but he did not indicate the exact amount of this loan. Appellant

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3/ In his Brief, appellant asserts that he "at all times" was under the impression that he was going to trial on the charge to which he pled guilty (Br. p. 2). In support, he cites a portion of his testimony at the post-conviction hearing (Nov. 22, 1974, at 27). However, in a later portion of this same testimony, appellant explained that he realized that there would be no trial when the government revealed the strength of its case and he was advised to plead guilty (Nov. 22, 1974, at 28).

acknowledged that Freno, Jr. repaid only a portion of the loan and that he had threatened Freno, Jr. with violence (Tr. Jan. 25, 1974, at 6-7). Appellant indicated to the court that his plea was not induced by any threats, promises, or coercion, and that he was pleading guilty because he was guilty. He also acknowledged that his plea was made with full understanding of the consequences of his guilty plea (Tr. Jan. 25, 1974, at 8). The court then accepted appellant's guilty plea (Tr. Jan. 25, 1974, at 9).

Thereupon, the court personally addressed MacQueen before accepting his guilty plea to the two counts of the superseding information. In the course of his recitation of the factual basis of his plea, MacQueen stated that he--and not appellant--was responsible for the threats on Freno, Jr. (Tr. Jan. 25, 1974, at 16). MacQueen explained that he acted on appellant's behalf because of their long friendship (Tr. Jan. 25, 1974, at 15).

After the court made a full inquiry into the voluntariness and the factual basis of MacQueen's plea and his understanding of his rights, the court accepted MacQueen's plea of guilty.

2. The Post Conviction Hearing.

At this hearing, appellant testified that Salcway never discussed with him a possible conflict of interest (Tr. Nov. 22, 1974, at 25). In the course of his testimony, appellant also asserted that he was innocent of the charge to which he had pled guilty. When the court pointed out that this assertion was

inconsistent with his prior guilty plea, appellant responded that he had not understood the court when he pled guilty (Tr. Nov. 22, 1974, at 18).

Saloway[4] then testified that he spoke with MacQueen and appellant on several occasions about the case and that he met separately with appellant about 20 or 30 times before appellant pleaded guilty (Tr. Nov. 22, 1974, at 32). According to Saloway, appellant and MacQueen "at all times" admitted their guilt. Saloway stated that after the government gave him transcripts of incriminating telephone conversations of appellant, MacQueen, and Freno, Jr., he concluded that the government had sufficient evidence to convict both his clients (Tr. Nov. 22, 1974, at 33). "In the best interest to them, I thought it best for them to plead guilty. I thought it quite clear at the time of the plea" (Tr. Nov. 22, 1974, at 34). Saloway testified that at the pleading stage, there was no conflict, but if the case had gone to trial and if there was a "title issue,"[5] he would have represented

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4/ Kenneth Saloway has been practicing law since 1964. He served as an Assistant District Attorney from 1966 to 1969 and has been in private practice since 1970. He has had extensive experience in criminal law (Tr. Nov. 22, 1974, at 30-31).

5/ Apparently, Saloway is referring to the question of whether appellant or MacQueen owned the debt of Freno, Jr.

either appellant or MacQueen, but not both. (Tr. Nov. 22, 1974 at 34-35). Saloway could not recall any specific conversation with appellant when he discussed a possible conflict of interest, but stated that: "There is no doubt that the subject did come up" (Tr. Nov. 22, 1974, at 36).

After hearing the testimony of appellant and Saloway, Judge Bartels denied appellant's motion (Tr. Nov. 22, 1974, at 40).

ARGUMENT

DEFENSE COUNSEL'S JOINT REPRESENTATION OF APPELLANT AND CO-DEFENDANT MacQUEEN DID NOT AFFECT THE VOLUNTARINESS OF APPELLANT'S GUILTY PLEA

It is well settled in this circuit "that some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel" (citations omitted). United States v. Lovano, 420 F.2d 769, 773-774 (2nd Cir. 1970), cert. den., 397 U.S. 1071. Appellant alleges, but fails to specify, conflicting interests of MacQueen and himself.

Moreover, the record affirmatively establishes that there was no conflict of interest between appellant and MacQueen when they pleaded guilty. Before the court below accepted appellant's guilty plea, appellant admitted threatening

Freno, Jr. and assured the court of his own guilt, as previously he had assured his own counsel (Tr. Jan. 25, 1974, at 6-9; Tr. Nov. 22, 1974, at 33). Thereafter, MacQueen also admitted threatening Freno, Jr. in connection with appellant's loan. Although MacQueen insisted at the guilty plea hearing that appellant bore no responsibility for the threats on Freno, Jr., this insistence by MacQueen obviously was not in conflict with any interest of appellant, since it tended to exculpate appellant (Tr. Nov. 22, 1974, at 15-16). In addition, defense counsel Saloway assured the court at the Rule 11 hearing and again at the post conviction hearing that appellant and MacQueen had explained all the circumstances to him, that both admitted their guilt and that there was no conflict of interest between his clients (Tr. Jan. 18, 1974, at 5; Tr. Nov. 22, 1974, 34-35).

Furthermore, the record shows that the court below adequately explained the danger of joint representation to appellant before accepting his guilty plea (Tr. Jan. 18, 1974, at 4). Appellant indicated to the court that he had considered this danger and that he was aware of co-defendant MacQueen's position in the case, but he wished to proceed and plead guilty (Tr. Jan. 18, 1974, at 4, 16). Under these circumstances, appellant cannot claim that his counsel's joint representation denied him effective assistance of counsel. United States v. Wisniewski, 478 F.2d 274, 281-284 (2nd Cir. 1973).

Appellant argues hypothetically that, if there had been a trial, MacQueen would have been willing to testify that he--and not appellant--was responsible for the threats and attack on Freno, Jr. (Br. p. 10). But there was no trial; accordingly, there was no occasion for appellant and MacQueen to have conflicting interests in having MacQueen testify or not testify.

2. The rule is also well established that in the absence of a jurisdictional defect, a guilty plea is susceptible to attack only if it was entered involuntarily. Glenn v. McMann, 349 F.2d 1018 (2nd Cir. 1965). See Tollett v. Henderson, 411 U.S. 258, 266-267 (1972); McMann v. Richardson, 397 U.S. 759, 770-771 (1969). Since appellant's claim of ineffective assistance of counsel must fail, the record discloses that appellant voluntarily pled guilty and is not entitled to collateral relief.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the denial of appellant's motion should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of this Brief for Appellee have this day been mailed to Patrick F. Broderick, Esquire, 38-08 Bell Boulevard, Bayside, New York 11361, counsel for Appellant.

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Dated this 23rd day of September, 1975.